No. 11652.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LEROY J. LEISHMAN,

Appellant,

vs.

RADIO CONDENSER COMPANY and GENERAL INSTRUMENT CORPORATION,

Appellees.

RADIO CONDENSER COMPANY and GENERAL INSTRUMENT CORPORATION,

Cross-Appellants,

vs.

LEROY J. LEISHMAN,

Cross-Appellee.

PETITION FOR REHEARING.

LEROY J. LEISHMAN.
2921 Greenfield Avenue, Los Angeles 34,
In propria persona.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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In this Honorable Court's opinion, dated May 4, 1948, the Summary Judgment granted by Judge Beaumont in the District Court was affirmed on the basis of this Honorable Court's prior decision in the case of *Leishman v. Wholesale Electric Co.,* 137 F. (2d) 722. This decision is in direct conflict with the District Court opinion in *Leishman v. Richards & Conover Company,* on which an appeal is now pending, No. 3577, United States Circuit Court of Appeals, Tenth Circuit.

The full implication of this affirmance of Judge Beaumont's decision may not have been apparent to this Honorable Court.

Under the doctrine of this Honorable Court's ruling, *no litigant is entitled to his day in court* so long as there is a decision by the Circuit Court of Appeals that is contrary to the *litigant's stand.* It is clear that the doctrine of an earlier case cannot be applied *until all of the evidence is in. If there is the least inkling of a doubt,* summary judgment should never be granted; and this has been time and again insisted upon in all of the pertinent authorities relating to summary judgment, one of which, perhaps, sums this situation up as well as any. Thus, in *Arnstein v. Porter,* C. C. A. 2, 154 F. (2d) 464, at page 471:

> "Illustrative of the dangers, in this respect, of summary judgment, if not cautiously employed, is a recent case in the court below. There the judge refused to grant summary judgment for defendants, despite a mass of impressive affidavits, containing copies of corporate records, the accuracy of which plaintiffs did not deny in their affidavits, and which on their face made plaintiffs' case seem nothing but a sham; at the trial, however, cross-examination of the defendants revealed facts, theretofore unknown by plaintiffs, that so riddled the defendants' case as it had previously appeared on the summary judgment motion that the judge entered judgment against them for several million dollars, from which they did not appeal."

Denial of the appellant's day in court has far-reaching results which will now be discussed.

Should appellant attempt to obtain a decision from any other Circuit Court of Appeals upholding his rights un-

der the patent at issue, the adverse party to that litigation could come into the Ninth Circuit, pray for declaratory relief (just as appellee did here) and obtain a rubber-stamped decision precluding appellant from ever trying the issues in any other jurisdiction. Once a litigant is faced with an adverse decision in this circuit, his hands would be forever tied; and, no matter where another suit would be started, declaratory relief would come to the aid of the adverse litigant, and he could rely upon the doctrine established in this case. No longer would it be possible for a patentee to carry his case to the Supreme Court for reconciling conflicting decisions; instead, the decision of *one* Circuit Court of Appeals would prevail over the entire United States.

Let us suppose that this Honorable Court had held that appellant's patent was valid and infringed in the *Associated* case. Then applying the doctrine of *stare decisis* any subsequent defense against that patent could be ruled out without a trial. The injustice of thus perpetuating possible error in a decision of the Circuit Court of Appeals is now apparent. Such a litigant would be faced with a summary judgment, just as appellant is here, and there would be no way in which he would be entitled to a full trial on the merits in an effort to show the error, if any there be, in a prior adjudication.

Appellant fully appreciates the force of the doctrine of *stare decises;* but that doctrine should not and cannot be applied until all of the evidence is in after a full trial on the merits. It is difficult, if not impossible, to evaluate what might occur in the course of the trial; and this was the basis for the decision in *Arnstein v. Porter, supra.*

Nor should the doctrine of *stare decisis* be so strongly urged where there is but *one prior* decision attempting to

establish a rule of law, and where another court has come to a fully contradictory conclusion.

Justice demands that a litigant be given his opportunity to assert and prove his case in the District Court. Even if the District Court should rule against him, such a litigant must be accorded the right to argue before this Honorable Court on the basis of all of the evidence taken in a full trial.

If the prior Associated case had attained the position of being *res judicata* in *this* litigation, then of course this Honorable Court's decision would have been proper. But between *different* litigants, either of them must have the right to show that the determination of an *ultimate fact* (*e. g.* of infringement in this case) is erroneous by additional fact testimony.

By summarily disposing of appellant's rights, as occurred in this proceeding, an error, once made by the Circuit Court of Appeals, would be merely strengthened and reaffirmed in all succeeding decisions, without any opportunity to cross-examine the witnesses of the adverse party or fully to develop his own case.

Regarding the issue raised in defendant's supplemental counter-claim, which the defendant sought permission to file, this Honorable Court erroneously stated that the defendant made no verified showing and that the allegations in the proposed counter-claim had been overcome by the affidavit of Maxwell James, submitted in plaintiffs' behalf. The affidavit of Maxwell James was filed on June 28, 1946 [R. Vol. I, p. 69], and not on July 8, 1946, as

stated in the opinion. Leishman's affidavit, which was filed on July 8, 1946 [R. Vol. I, p. 72], was thus filed subsequent to the James affidavit, and many of the allegations and accusations therein were thus not discussed in the James Affidavit.

The defense that the plaintiffs are bound by the Oklahoma judgment, is a defense on which witnesses have to be examined and cross-examined, and all of the evidence can not be adduced in advance of a trial so that it can be presented in affidavit form; but there was a verified showing in defendant's second affidavit [R. Vol. I, pp. 69 to 72] of at least sufficient participation to show that this defense was far from a sham and that it was at least within the range of possibility that the examination and cross-examination of witnesses could unearth additional evidence. None of the allegations in defendant's affidavit were overcome by the James affidavit; in fact, the James affidavit admitted some of the acts of participation alleged in the counter-claim which the defendant sought permission to enter. Numerous decisions with respect to summary judgments are to the effect that they should never be granted if there is even the slightest possibility that the opposing party might prevail. Certainly it cannot be said in this case that there is not even a remote chance that the defendant might establish this issue. The defendant insists that the case of *Arnstein v. Porter, supra,* is very much in point here.

Footnote 9 on page 5 of the pamphlet opinion says that a certified copy of the Findings of Fact, Conclusions of

Law and Judgment in the Oklahoma case were filed long after the appeals were taken. It would appear that this may have been the basis for the statement that there was no verified showing, and the court may have meant that defendant's motion under Rule 15d was not supported by a certified copy of the Oklahoma Findings of Fact, Conclusions of Law and Judgment. The filing date of May 29, 1947, given on page 63 of Volume I of the record, is a clerical error.

It will be noted that in Leishman's Second Affidavit in Support of Motion under Rule 15(d), filed July 8, 1946, the statement is made in paragraph 10 [R. Vol. I, p. 72] that a certified copy of the Findings of Fact, Conclusions of Law, and Judgment in the Oklahoma action were *then* on file. Page 62 of the record shows that the judgment in the Oklahoma case was entered on June 10, 1946, and page 63 verifies that the Findings of Fact, Conclusions of Law and Judgment were certified on that very day. That is because defendant was proceeding with dispatch to get a certified copy in Los Angeles for filing at the earliest possible time. It was rushed to Los Angeles by air mail and was presented to Judge Beaumont personally for entry in the record during a hearing on June 11, 1946—the very day after the Oklahoma judgment was entered. This hearing is referred to in paragraph (3) of the James affidavit on page 66 of the record. A certified copy of pages 5, 6 and 7 of the transcript of the hearing before Judge Beaumont on June 11, 1946, is being filed with this Honorable Court with the Petition for Rehearing, and it is printed as an appendix to this petition.

There was thus a certified copy of the Oklahoma Findings of Fact, Conclusions of Law and Judgment in the record before Judge Beaumont on June 11, 1946, and the Motion under Rule 15d was thus properly supported and should have been granted.

This Honorable Court should not deprive defendant of his right to make the Supplement Counter-Claim and to a trial of the issue therein raised, because of a clerical error.

Defendant urges that this Honorable Court should also reconsider its action in modifying the injunction so as to enjoin the defendant from proceeding against the Galvin Manufacturing Company. The affidavit of Maxwell James sets forth [R. Vol. I, p. 67] that the Galvin Company assumed the defense of the Oklahoma suit, and Finding of Fact No. 3 in that action [R. Vol. I, p. 53] states that the Galvin Manufacturing Corporation is bound by the judgment.

In view of the admission by opposing counsel Maxwell James and the Finding of the U. S. District Court for the Western District of Oklahoma, it should be clear that the Galvin Manufacturing Corporation *is* bound by the Oklahoma judgment; and this Honorable Court should therefore not enjoin the defendant from enforcing that judgment against the said Galvin Manufacturing Corporation.

The defendant also wishes to point out that a trial of the issue of validity could have affected the issue of infringement in a very material way, because a proper determination of the nature and extent of the invention

has a direct bearing upon the interpretation and extent of the claims. Judge Harrison, for example, in his opinion in the *Associated* case reported in 36 F. Supp. 804, at 805, says: "The physical part of the patent consists of a rocker and an adjustable tappet." If this is correct, the operation of the tappet by either a plunger or a lever can have no bearing upon the infringement of claims like claims 7 and 8, which do not call for any operating member of any kind.

> "It has come to be recognized, however, that of the two questions, validity has the greater public importance. (Cover v. Schwartz (C. C. A. 2d), 133 F. (2d) 541, and the District Court in this case followed what will usually be the better practice by inquiring fully into the validity of the patent."
>
> *Sinclair and Carrol v. Inter Chemical Corp.*, 325 U. S. 327, 330, 65 S. Ct. 1143, 1145.

Defendant urges that this Honorable Court should grant a rehearing on the appeal and cross-appeal.

Respectfully submitted,

LeRoy J. Leishman.
In propria persona.

Certificate.

This petition is in my judgment well founded and it is not interposed for delay.

LeRoy J. Leishman.
In propria persona.

Now, I think the importance and the significance of these issues, these two that I have mentioned, has been shown by what happened in the trial before the District Court for the Western District of Oklahoma in the case of Leishman v. Richards & Conover Company.

The decision there was rendered after a full trial, after evidence was presented that was not before the Tenth Circuit Court of Appeals, and after witnesses testified and were cross-examined.

The Court: Before the Tenth Circuit Court of Appeals?

Mr. Leishman: Yes; the evidence that we presented there on the matter of infringement and the matter of equivalency was all evidence that was not before the Circuit Court of Appeals here.

The Court: I thought you said the Tenth Circuit. Did you mean the Tenth Circuit?

Mr. Leishman: I did. I mean the Ninth Circuit. I am glad you caught that.

The court there held that the plungers and levers are clearly equivalents and that claims 7 to 11 of the reissue patent are clearly infringed.

I have received today a certified copy of the signed Findings of Fact and Conclusions of Law, and also the Judgment in the case there, which I would like to make of record in this case. I have the certified copy here, and I will be glad to give Mr. Lyon a copy identical to it.

I would like to call your Honor's attention particularly to findings 6, 11, 12 and 16.

Finding 6 says:

"Claims 7, 8, 9, 10, and 11 of the reissue patent"—

By the way, they are the same claims at issue here.

"reissue patent No. 20,827 are clearly valid, and clearly infringed due to the use of tuning devices in the following radio receiver sets manufactured by said Galvin Manufacturing Corporation and sold by defendants:"

And the numbers of the models are listed.

"This finding is made without any regard to any commercial success which plaintiff's tuners have attained."

Then 11 on page 3 of the findings reads:

"The tappet or positioning element described in plaintiff's reissue patent No. 20,827 may be mounted either on a lever or a plunger to move the tappet, since a lever and a plunger perform their functions in the same way and are mechanical equivalents."

Finding 12 is equally in point—

Mr. Lyon, Sr.: Are these supposed to have been signed, Mr. Leishman?

Mr. Leishman: Yes.

Mr. Lyon, Sr.: The copy you gave me isn't.

Mr. Leishman: The certified copy is the one I just gave to Judge Beaumont.

Mr. Lyon, Sr.: When was it signed?

Mr. Leishman: Yesterday. It arrived here this morning by special delivery air mail.

Finding 12:

> "The finding 11 is based not only upon the evidence offered on behalf of plaintiff, but also upon the direct testimony of defendant's expert, Dr. Spotts, who testified to the effect that the substitution—"

The Court: What are you reading from there?

Mr. Leishman: This is finding 12.

The Court: All right.

Mr. Leishman: "The finding 11 is based not only—"

The Court: I read that.

Mr. Leishman: Finding 16 is similarly in point.

> "The use of plungers for operating mechanical automatic tuners was known long prior to plaintiff's development of his patented structure set forth in the reissue patent in suit."

The Oklahoma decision was a practical demonstration that

District Court of the United States, Southern District of California, Central Division.

United States of America, Southern District of California—ss:

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of pages 5, 6 and 7 of the Reporter's Transcript of Proceedings dated Tuesday, June 11, 1946, in the matter of "Radio Condensor Company and General Instrument Corporation v. Le Roy J. Leishman, No. 4395-B-Civil. Filed June 28, 1946, as the same appears from the original record remaining in my office.

Witness my hand and seal of said Court, this 27th day of May, A. D. 1948.

(Seal)

EDMUND L. SMITH,
Clerk,

By EDWARD F. DREW,
Deputy Clerk.